DEC 2 1 2005

NOS. 04-10566 AND 05-51

# In The Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

*Petitioner*

v.

OREGON

*Respondent.*

MARIO A. BUSTILLO,

*Petitioner*

v.

GENE M. JOHNSON, DIRECTOR OF VIRGINIA DEPARTMENT OF CORRECTIONS

*Respondent.*

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

## BRIEF OF AMICI CURIAE THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The European Union (EU) considers the respect for treaty based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-five Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR).[2] Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36. This position has been expressed to the Government of the United States through specific demarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36.[3]

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici* and counsel, have made a monetary contribution to the preparation or submission of this brief. Global consent letters from all parties for all *amicus curiae* briefs are on file with the Clerk of the Court. Counsel acknowledge the valuable coordination and research for this project from Anne James, Executive Director and Joanne Cecil, Project Assistant, International Justice Project.

[2] *Opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[3] Demarches in the cases of foreign nationals were transmitted in each of the following: Javier Suarez Medina, Texas (Mexican), 23 July, 2002; Hung Thanh Le, Oklahoma (Vietnamese), 4 December, 2003; Gerardo Valdez, Oklahoma (Mexican), 13 July, 2001; Osvaldo Torres, Oklahoma (Mexican) 30 April, 2004. All these communications can be found on the Internet, *EU Policy and Action on the Death Penalty, at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActionnonUSDeathRowCases. See, also European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (June 3, 1998), Part III(v) *at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm.

As nations committed to the rule of law, the Member States of the EU have a fundamental interest in compliance with international instruments, particularly when the rights of a Member State's national may be in the balance.

The EU believes that it can provide this Court with a special and unique perspective that is not available through the views of the parties.

Liechtenstein, Norway and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

## SUMMARY OF ARGUMENT

Article 36 confers on detained foreign nationals a right to be informed, without delay, by the arresting authority, of the right to contact consular officers of the Sending State. The right to be so informed is an individual right (as well as a right accorded to the Sending State). If the foreign national is convicted without being informed of the rights under Article 36, that individual must be allowed to apply to a court in order to challenge the conviction and sentence by claiming, in reliance on Article 36 (1), that the competent authorities failed to comply with their obligations to provide the requisite consular information.

Courts must conduct such a review even if their procedural rules, such as those relating to default of claims, would otherwise preclude review. These propositions have been

affirmed by the International Court of Justice (ICJ).[4] Furthermore, the right to consular access is a right protected under customary international law and must therefore be observed.

## ARGUMENT

### I. THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY FORM OF PROTECTION FOR FOREIGN NATIONALS

The VCCR, a product of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, is a global multilateral treaty that governs consular relations and regulates many aspects of the relationship of foreign consuls to a host Government. The VCCR has been ratified by 168 States (including the United States on November 24, 1969) and is the cornerstone of international consular relations.[5] Its conclusion is regarded as "the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention".[6]

The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement

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[4] *LaGrand (F.R.G. v. U.S)*, 2001 I.C.J 104 (Jun. 27); *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

[5] United Nations, *Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

[6] LUKE LEE, CONSULAR LAW AND PRACTICE at 26 (2d. ed. 1991).

of Disputes (Optional Protocol) provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".[7]

The ICJ is "the principal judicial organ of the United Nations" (U.N.).[8] The Court's statute is annexed to the U.N. Charter; therefore, States which become members of the United Nations also become parties to the Statute.[9]

The United States[10] and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by States that are party to litigation is a basic principle of the international legal order as articulated in the United Nations Charter, Article 94: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".

Article 36 recognizes the rights of consuls to communicate with and assist their nationals. Article 36 also confers specific rights on detained or imprisoned foreign nationals. As the United States Government has noted before the International Court of Justice, Article 36 "establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the Sending State who are

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[7] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261.

[8] U.N. Charter, *opened for signature* June 26, 1945, 59 Stat. 1031, T.S. No. 993, Article 92; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993.

[9] U.N. Charter, Article 93, para.1.

[10] The United States ratified the U.N. Charter on August 8, 1945. United Nations, *Multilateral Treaties Deposited with the Secretary General, Charter of the United Nations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp

assured access to consular officers and through them to others."[11]

Article 36 requires a Receiving State to inform detained foreign nationals of their right to communicate with their consulate and to facilitate access between detained foreign nationals and consuls of the Sending State. In addition, Article 36 confers specific State rights, recognizing the right of consuls to have access to, communicate with, and assist their detained national. Further, it establishes an obligation upon the Receiving State under paragraph 1 (c) of Article 36 to enable the consular officers to arrange for legal representation of their nationals.

The significance of consular access has been expounded upon by the Inter-American Court of Human Rights (IACtHR). The IACtHR stated that "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."[12] The IACtHR stated that the right to be informed of the right to consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights".[13]

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in

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[11] U.S. Diplomatic and Consular Staff in Tehran (*USA v. Iran*), ICJ Pleadings, at 174.

[12] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 121, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (1999).

[13] *Id.* para 123.

the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 reflects agreement among the States parties that foreign nationals require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence.

## II. ARTICLE 36 PROVIDES JUDICIALLY ENFORCEABLE RIGHTS

This Court has provisionally accepted in *Breard v. Greene*[14] that the VCCR confers on a foreign national a right to consular assistance following arrest. The ICJ in *LaGrand (F.R.G. v. U.S.)*, stated that Article 36 provides a right invocable by the foreign national. Article 36 provides, in part: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph." The ICJ confirmed that Article 36 creates a right for a foreign national both because of this plain language, and "[m]oreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposed such action.' The clarity of these provisions, viewed in their context, admits of no doubt."[15]

## III. JUDICIAL REVIEW OF CONVICTION AND SENTENCE IS REQUIRED IF ARTICLE 36 IS VIOLATED

If a foreign national is convicted absent compliance with the notification obligation of Article 36, the rights of both the Sending State and the foreign national are implicated, and the conviction must be reviewed. Article 36 provides in a second paragraph: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full

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[14] *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[15] *LaGrand (F.R.G. v U.S.)*, 2001 I.C.J. 104 (Jun. 27), para 77.

effect to be given to the purposes for which the rights accorded under this Article are intended".[16]

The ICJ has addressed required remedies, first in *LaGrand* in 2001, and more recently, on March 31, 2004, in *Avena and other Mexican Nationals*.[17] In Article 36, paragraph 2, the ICJ found an obligation to allow a foreign national to seek a remedy: "The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual".[18]

The ICJ held that where the notification obligation under Article 36 has not been observed, action on the criminal conviction is required: "if the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention".[19]

The ICJ subsequently affirmed in *Avena* the requirement for review and reconsideration of a breach of Article 36 rights. The Court considered "that it is the judicial process that is suited to this task".[20] Contrary to the argument of the US,

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[16] VCCR, Article 36, para. 2.
[17] *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).
[18] LaGrand, para. 89.
[19] *Id.* para. 125.
[20] *Id.* para. 141.

the Court stated that consideration by way of executive clemency does not suffice in view of the fact that the clemency process, as currently practiced in the US, does not appear to meet the requirements and it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration".[21]

## IV. REVIEW MUST TAKE ACCOUNT OF THE VIOLATION

Review and reconsideration is required even absent a showing that a different result would have been achieved had a consul intervened. As indicated above, a consul may act in a variety of ways in a particular case. After a person has been convicted without being informed of the right of consular access, it may be impossible to determine what impact a consul might have had on the proceedings.

Article 36, by requiring consular access, presumes that it will help a foreign national. The ICJ stated in *Avena*, "The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention".[22]

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[21] *Avena*, para. 143.

[22] *Avena* para. 122.

## V. RULES ON DEFAULT MAY NOT BE APPLIED

The ICJ ruled that treaty obligations require that rights be enforced at whatever point in time it remains possible to do so, regardless of rules on procedural default. "The problem arises," the ICJ stated, "when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the Sending State".[23] The ICJ concluded on the facts of the *LaGrand* case, "Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36".[24]

Expanding upon this position, the ICJ in *Avena* asserted that "[t]he crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution".[25]

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[23] *LaGrand*, para. 90.
[24] *Id.* para. 91.
[25] *Avena*, para. 134.

## VI. CONSULAR ACCESS IS A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW

The rights of a foreign national as provided in Article 36 are part of the corpus of customary international law. Indeed, the United States accepts that consular access is required by a customary norm and it "looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement." Consular notification is, in the view of the United States, "a universally accepted, basic obligation..."[26]

In addition to the widespread ratification of the VCCR, the customary character of the consular access right is evidenced by its inclusion in other international instruments. International norms and standards adopted by international bodies and organizations, including the United Nations, further reflect acceptance of the necessity for full respect and observance of the right to consular access.

While the VCCR is the foundational treaty that regulates consular relations, additional treaties, including a number ratified by the United States, incorporate the principle. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States to punish those who commit torture. A torture suspect who is a foreign national "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national". [27]

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[26] DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, at 44 (1998).

[27] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 (3), G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

Furthermore, a foreign national charged with a crime against a diplomat is entitled, by virtue of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to consular access.[28]

Since 2000, the Organization of American States General Assembly has also enshrined these principles in the resolution on *The Human Rights Of All Migrant Workers And Their Families*.[29]

Various U.N. bodies have further confirmed this fundamental principle. The U.N. General Assembly has affirmed the right to consular access in a number of resolutions. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that a foreign national is entitled to consular access, and to be informed of that right.[30] In addition, the Declaration on the Human Rights of Individuals Who Are

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[28] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Article 6, 28 U.S. Treaties 1977 (1973).

[29] *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1717 (XXX-O/00) (Resolution adopted at the first plenary session, held on June 5, 2000); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1775 (XXXI-O/01) (Resolution adopted at the third plenary session, held on June 5, 2001); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1898 (XXXII-O/02) (Resolution adopted at the fourth plenary session held on June 4, 2002); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1928 (XXXIII-O/03), (Resolution adopted at the fourth plenary session, held on June 10, 2003); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2027 (XXXIV-O/04), (Resolution adopted at the fourth plenary session, held on June 8, 2004).

[30] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. General Assembly Resolution 43/173 (1988).

Not Nationals of the Country in Which They Live views consular access as a right in the event of a detention.[31]

The U.N. General Assembly has "reaffirm[ed] emphatically the duty of States parties to the Vienna Convention on Consular Relations of 1963 to ensure full respect for and observance of the Convention, in particular with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own State in the case of detention, and the obligation of the State in whose territory the detention occurs to inform the foreign national of that right".[32]

Both the U.N. Rules for the Protection of Juveniles Deprived of their Liberty[33] and the U.N. Standard Minimum Rules for the Treatment of Prisoners[34] provide that if a foreign national is arrested, the right of consular access must be respected.

## VII. CONCLUSION

The EU considers the implementation of the right of consular access to be of utmost importance to members of the international community. Article 36, as construed by the ICJ, requires the review and reconsideration of the conviction and sentence in the present cases. When notification is omitted

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[31] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Article 10, U.N. General Assembly Resolution 40/144 (1985).

[32] Protection of Migrants, U.N. General Assembly Resolution, A/RES/58/190 (Mar. 22, 2004), para. 10.

[33] G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

[34] Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957).

and a criminal conviction ensues, courts must provide a remedy. As the ICJ stated in *Avena*, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts."[35]

In light of the international law norms articulated above, the EU, Liechtenstein, Norway and Switzerland respectfully support the position of Petitioners.

Respectfully Submitted,

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[35] *Avena*, para. 121.